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AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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To Promote the Efficient Administration of Justice

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

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The Red Mass

TO INVOKE GOD'S BLESSING AND GUIDANCE in the administration of justice is the object of the traditional ceremony known as the Red Mass, celebrated in many Catholic churches and attended by members of the bench and bar at the opening of the judicial year.

The precise origin of the Red Mass is obscured by its antiquity. The tradition goes back many centuries in Rome, Paris and London. From time immemorial this beautiful ceremony has officially opened the judicial year of the Sacred Roman Rota. During the reign of Louis IX, Saint Louis of France, La Sainte Chappelle was designated as the proper setting for the service. This magnificent edifice was used but once during the year, and then for the Red Mass. The custom in England began in the early Middle Ages, and even during the recent war English judges and lawyers of all religious faiths annually attended the Red Mass in Westminster Cathedral to plead for the assistance of Almighty God in the discharge of the sacred responsibilities of the legal profession.

The Red Mass was introduced in this country in the city of Washington about twenty years ago, and now is celebrated in many of our large cities. In Boston, where it has been carried on since 1941 under the sponsorship of the Boston College Law School, it has reached its greatest development. The 1948 Red Mass was celebrated in Boston on Saturday morning, October 2.

There, in the roped-off street in front of the lofty Church of the Immaculate Conception, under sunny skies, leading governmental, judicial and legal dignitaries of the state and city gathered to lead the colorful procession by which the church was filled. Headed by Governor Robert F. Bradford, the procession included the United States senators from Massachusetts, supreme court justices of Massachusetts and neighboring states, federal judges and most of the state judiciary, United States congressmen, the mayor of Boston and other high officials of the city and state, members of various governmental legal staffs, representatives of bar associations and legal organizations from far and near, members of the bar, representatives of other law faculties, and the entire faculty and student body of Boston College Law School, followed by the officers of the Mass and His Excellency, the Most Reverend Richard J. Cushing, Archbishop of Boston. The congregation that followed the procession into the church filled every available seat.

President Robert I. Gannon of Fordham University, delivering the principal address, noted a recent statement by President Truman that this is a Christian nation and questioned

The idea that lawyers should unite to promote a more efficient administration of justice was first proposed by Herbert Lincoln Harley, who devoted the best years of his life to this form of service.

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its accuracy as judged by present-day education, philosophy and morality, but affirmed its truth so far as our country's origins, traditions and ideals are concerned, and especially its democracy—a Christian concept of human relations. But that democracy, he warned, "is seriously threatened with change because of the changing ideals of our bench and bar.

"In the Supreme Court of the United States and in many of the state courts throughout the land we are witnessing a struggle between the old and new theories of law; between what I might call the scholastic and the realist interpretation of the law. The old theory which is presupposed in the Constitution and the Declaration of Independence, which is part of the tradition of American democracy, rests on the fact that there is a superior law which tests the laws of men, and that there are objective standards for weighing the validity as well as the expediency of new legislation. The new theory of law ignores the existence of God as the source of all authority, minimizes principles and precedents, discards the fundamental doctrine of *stare decisis*, and makes the judicial process a thing of mere utility tempered with emotion, whim and intuition.

"The layman may be unable to express his doubts and fears in legalistic terms, but basically his thought is that the sands are shifting under him; that there is no more certainty in the law—no more permanent rights—no more inalienable rights—no more natural rights since the Natural Law went out of fashion. If this Natural Law continues to be ignored in our schools, and God, the Author of the Natural Law, continues to be excluded from His rightful place on the bench beside the judge, the last link that binds us to our Christian past, our Christian concept of democracy, will disappear, and the President's critics will be right when they say 'The U. S. A. is in no sense a Christian nation.'"

The Coming Inter-American Bar Convention

The Inter-American Bar Association meeting in Detroit, next May 22 to June 1, will offer a valuable opportunity for American lawyers and judges to get acquainted with their professional brethren from Canada and the Latin-American countries, and to learn something about legal problems and procedures, the practice of law, and the administration of justice in those lands. Such contacts cannot help but benefit all of the countries and all of the people involved.

That Association, as most of our readers doubtless know, is a federation of state and national bar associations throughout the Western Hemisphere. It has no individual memberships, and individuals participate in its activities as delegates from their respective associations. It is the custom, in preparation for the meetings, for the executive committee to prepare and assign in advance a list of topics to be considered by the seventeen committees and sections of the Association. The American Judicature Society is a member organization, and the following topic has been assigned to us for the preparation of a paper for the Detroit conference:

Committee VI, Topic 2: A comparative study of advisory opinions and declaratory judgments with respect to constitutional questions.

Members of the American Judicature Society who are interested in this subject and would be willing to write a paper on it for presentation at Detroit next May are requested to communicate with the secretary of the Society at once. The maximum length of the paper is 4,500 words, and the deadline for submission of the manuscript is March 1, 1949.

Although we are specifically responsible for only this one topic, the Association will welcome papers from our members on any of the other topics set forth in the executive committee's list. A complete list may be secured on request, but the following are here suggested because of their bearing on our field of judicial administration:

Committee III, Topic 2: A comparative study of the extent of judicial control over administrative action in the Americas.

Committee III, Topic 4: The doctrine of *res judicata* as applied to administrative acts.

Committee VI, Topic 1: A comparative study of the theory and practice of judicial review.

Committee VI, Topic 2: A comparative study of advisory opinions and declaratory judgments with respect to constitutional questions. (Topic

officially assigned to American Judicature Society.)

Committee IX, Topic 2: Principles of law involved in the prevention of juvenile delinquency.

Committee XII, Topic 2: The regulation and status of the bar in the Americas. (Consideration of Report of the Colegio de Abogados de Chile.)

Committee XII, Topic 4: Public relations of the organized bar.

Committee XII, Topic 5: Proposed oath for lawyers similar to that to which the medical profession subscribes.

The word limit on unofficial papers on these topics is 2,500. Members of the American Judicature Society interested in contributing such a paper should write to the secretary of the Society immediately. The deadline for these, also, is March 1, 1949.

No Case Is Unimportant

By GEORGE ROSSMAN

In recent years the Supreme Court of Oregon has endeavored to make the admission of young lawyers to the bar a memorable occasion. At such a ceremony last September 21, Lamar Tooze, chairman of the Board of Bar Examiners, moved their admission with appropriate remarks; W. W. Balderree, president of the State Bar of Oregon, seconded the motion with further observations; and, after administration of the oath by the clerk of the court, Chief Justice Rossman delivered the following address on behalf of the Court.

THE MOTION made by Mr. Tooze, Chairman of our Board of Bar Examiners, and seconded by Mr. Balderree, President of the Oregon State Bar, will be sustained. An order will be entered inscribing the name of each one of you upon the roll of Oregon attorneys.

It is a pleasure to express to each of you the warm congratulations of all members of this court upon the fact that you have been found worthy, both in character and in learning in the law, of becoming members of the legal profession. All of us entertain the earnest hope that nothing but good fortune will await those of you who enter upon the practice of the law, and that the others of you will be able to find useful employment for your knowledge of the law.

This court values highly the work performed by Mr. Tooze and his fellow members of the Board of Bar Examiners. The service which they render is exacting and consumes time throughout the year. It is a labor of love. The members of the profession customarily fail to express the appreciation which all feel for the work performed by the Board in sustaining high standards. The Board has the thanks of this court.

The parents of some of the members of this class are present this morning. Some of the fathers who are here are attorneys who are valuable members of our profession. Whenever parents conduct a home in such a manner that there learning is revered and the children are inspired with an ambition to earn a place in one of the learned professions, the parents are entitled to commendation. This morning, when we congratulate the members of this class, we have a high place in our thoughts for their parents.

We hope that each one of you will deeply appreciate the fact that you are now a member of the legal profession and that you are now an officer of the courts of Oregon. Daniel Webster valued so highly the education which his father rendered it possible for him to receive that whenever he returned to the spot where he stood when his father told him that he would send him to college, Webster paused there for a moment and manifested his gratitude. May we hope that you will so appreciate this hour that our courtroom will be forever deemed by you a hallowed place.

You are now becoming life tenants of the legal profession. Its destiny is as much in your hands as in those of anyone else. You are now an officer of the courts of this state. Your duties will differ in kind from those performed

by the man upon the bench, but their purpose should be exactly the same. Webster offered the toast: "The law, it has honored us; may we honor it." You can honor the law by lending your support to all who strive to improve the administration of justice. Every program which is intended to render the administration of the law more certain, more prompt and less expensive, should receive your unstinted help.

COKE AND SHELLEY'S CASE

Those of you who do not enter into association with an attorney who has an established practice may feel that in the next few years nothing but unimportant cases will come to you. But let me earnestly caution you not to view as unimportant any item of business which you accept. Every matter which you accept you must regard as important. Never deem unimportant anything which you do for a client.

Three hundred and seventy years ago a young man of your age by the name of Edward Coke was admitted to the bar of England. One year later there came to his office a piece of business in which a man by the name of Nicholas Wolf was suing another by the name of Henry Shelley in trespass. According to the declaration, Shelley's livestock had trespassed upon the close of Wolf and had ruined the pasture. Wolf asked for damages in the amount of 100 marks. One hundred marks was about $300. That is not a large sum today and was not deemed a very large sum 370 years ago. Shelley, the defendant, had as his principal counsel Solicitor-General Sir John Popham, who later became Chief Justice of the King's Bench. Coke was his bright and energetic junior associate. Coke was of a serious frame of mind. His industry was almost unbelievable and everything which he did he deemed important. This case was argued three times before the Court of the King's Bench. Then Queen Elizabeth heard about it and ordered the Lord Chancellor to have the case heard before all of the judges of England. A few days later the case was again argued, this time before the Lord Chancellor, the Chief Justice of the Court of the King's Bench, the Chief Justice of the Court of Common Pleas, the Chief Baron of the Exchequer, together with all of the associate justices and barons. Shortly it was argued once more before all of those jurists. Eventually the case was decided. Coke's side prevailed. The title of that case is a household word throughout all of the courtrooms and law offices where the common law is employed—the Rule in Shelley's Case. This remarkable event occurred in the life of a very young attorney, partly on account of the fact that he deemed every piece of business which came to him as important and worthy of his best efforts.

In 1786, a year before the Constitutional Convention met in Philadelphia, a butcher by the name of John Weeden came to the office of an attorney by the name of James P. Varnum in Providence, Rhode Island, and engaged Varnum's services in a case wherein Weeden was being sued for the recovery of a fine. Hundreds, in fact thousands, of clients have come to attorneys upon similar errands and normally the attorney tells the client offhand to settle for the least amount he can; in short, most attorneys do not take such matters seriously. But Varnum was not that kind of attorney. Weeden, according to the facts which he related to Varnum, had sold some meat to a customer by the name of John Trevett and had refused to accept paper money printed by Rhode Island in payment of the charge. A statute of Rhode Island required merchants to accept this unwanted paper money in payment of bills, and subjected them to a fine in the event they refused to accept the paper. When Varnum read the statutes he discovered that in the proceedings attendant upon the assessment of the fine, trial by jury was denied to the defendant. He became convinced that the statute was unconstitutional. According to Judge Cooley, no court, up to this time, had declared any statute unconstitutional. Bear in mind that this was before the Constitution of the United States was written. Varnum wrote an exhaustive brief upon the subject and when court convened he filed his brief. Eventually the court decided the case. The decision was in favor of Weeden, Varnum's client. No fine was assessed. Thus this was the first case in which a court refused to recognize the validity of a statute. Possibly no brief has been cited more frequently than Varnum's. Here was a remarkable success and it came to Varnum because he regarded the business of his client important.

MARBURY V. MADISON

Seventeen years after Varnum wrote his brief there came before the United States Supreme

Court Marbury v. Madison. The basic fact in that case was nothing more important than the appointment of a justice of the peace. Yet that rather prosaic fact did not prevent Chief Justice Marshall from deeming the case as worthy of his best, and on account of the fact that he regarded the case as important, we have the doctrine of judicial supremacy and a government of laws, not of men.

In 1819 a serious-minded young man by the name of Richard Blatchford was admitted to the bar of New York. He deemed all matters which affected his clients as important, and was endowed with a mind well adapted to advising clients who were engaged in business. His practice prospered and his office was soon enriched with clients who came there with important matters. He became the general counsel for the Bank of the United States and the American attorney for the Bank of England. Soon other attorneys were working for him and after his son had been admitted to the bar he joined his father in the practice. Eventually the father retired and entrusted his clients to younger men. Now, more than a century and a quarter have passed since Richard Blatchford was admitted to the bar, but his practice and tradition continue. They are carried on by his successors who constitute one of the nation's largest law firms. Recently one of the present partners wrote a history of the firm. It is two volumes in extent. As one reads them he sees that since 1819 the firm has touched virtually every phase of the industrial and economic development of our country. All of this came about because the firm originated in the genius of a man who took the business of his clients seriously and was determined to give each of them the best attention of which he was capable.

STENOGRAPHIC SERVICES IMPORTANT

About 45 years ago Judge Charles H. Carey and Mr. James B. Kerr, both of Portland, organized a law firm in our state. Its name was Carey & Kerr. Important business soon came to the firm. They added some associates and rented additional offices. Then they took into their employ as chief stenographer a young woman by the name of Mrs. M. H. Potter, who was given charge of the stenographic, clerical and filing staff. She deemed the typing, punctuating and phrasing of every paper that went out of that office as important. Not a document left a stenographer's hands without having received Mrs. Potter's personal perusal; if she thought that any feature of it did not meet the high standards which she associated with Carey & Kerr, the paper received further attention. A member of the present firm which today carries on the practice of Carey & Kerr told me a few days ago that of the numerous lawyers, associates and clerks who have constituted a part of the firm's staff, none have made greater contributions to the success of the practice than Mrs. Potter.

Thus, we see that every piece of business which will come your way must be deemed by you as important. You should not even write a letter without regarding it as important. The extent to which you will regard your practice and conduct important will largely determine your success and place in the profession.

TO GAIN STRENGTH EMPLOY IT

Let me strongly urge you always to use your strength. Make the most that you can out of your facts, your law and your personality; but never, under any circumstances, resort to weakness such as deceit, misrepresentation or trickery. The only way you can gain strength is to employ it. The way to advance at the bar is to strengthen your knowledge of law and the force of your personality. We are all familiar with the Biblical truth which we see illustrated over and over again: "Unto him that hath there shall be given, while from him that hath not there shall be taken even that little which he hath." We know the Biblical story of the master who upon departing upon a long journey entrusted his wealth to his servants, each according to his respective ability. Into the hands of the one there were entrusted ten talents of silver, to another, five talents, and to a slovenly servant, only one talent. When the master returned an accounting took place, and the one who had received the ten talents had put it out to use and was able to return ten talents more. The master commended him with: "Thou good and faithful servant, thou hast been faithful over a few things and shall be made lord over many." But the slovenly servant had buried the talent with which he had been entrusted and in returning it reproached the master as one who wished to reap where he had not sown. When he returned his talent the master took it from him

and handed it as a reward to the servant who had made the profit of ten talents, and then said: "Unto him that hath there shall be given, while from him that hath not there shall be taken even that little which he hath." The way to acquire more strength is to employ to the utmost all of the qualities of mind, of character and personality which you possess. Never resort to weakness, deceit, deception or trickery. Never believe that your guilt will not be discovered. If you employ trickery or deceit, it may be that neither the judge on the bench or your opponent at the counsel table will discover your guilt, but your guilt will be discovered by a man of utmost importance to you—yourself. You will know your guilt and when you discover yourself doing something that is wrong, you will pay the penalty. You will forfeit your own self-respect. Throughout all of life you will have to live in your own company, and no lawyer is fit company for himself when he has lost his self-respect.

Justice Oliver Wendell Holmes wrote: "Pleasures do not make happiness and the root at once of joy and beauty is to put out all of one's powers to a great end—to hammer out as compact and solid a piece of work as one can, to try to make it first-rate, and to leave it unadvertised." I express the sincere hope that those of you who enter upon the practice of the law will find here in the profession the happiness which every human being seeks. I hope that the practice of law will operate as a magnet and draw from you your utmost strength—of mind, of character and of personality. It is in the performance of work which exacts the best that we have that we find the joy and beauty which constitute true happiness.

The Dissent: A Safeguard of Democracy

By WILLIAM O. DOUGLAS

All of us in recent years have heard and read many criticisms of the dissenting or concurring opinion. Separate opinions have often been deplored. Courts have been severely criticized for tolerating them. And that is why I rise to their defense.

About ten years ago when I took my seat on the bench, Chief Justice Hughes said this to me: "I think you will find after you have been on the bench for a while that in a great majority of the cases, perhaps in two-thirds of them, the judges will ultimately reach agreement and announce opinions that are unanimous. But in at least a third of the cases, agreement will not be possible. In those cases there will be dissents—no matter how carefully the judges were chosen—whether one President or several Presidents selected them."

Chief Justice Hughes spoke from a long experience both at the bar and in the conference room. In these days of uneasiness and confusion what he said to me is important not only to judges and lawyers but to everyone. It is indeed only when the meaning of his words is clear that the true nature of the judicial process is brought home to the community.

Address by Mr. Justice Douglas of the Supreme Court of the United States before the Section of Judicial Administration of the American Bar Association, Seattle, Washington, September 8, 1948.

SEARCH FOR CERTAINTY

Holmes, perhaps better than anyone either before or after him, pointed out how illusory was the lawyer's search for certainty. Law is not what has been or is—law in the lawyer's sense is the prediction of things to come, the prediction of what decree will be written by designated judges on specified facts. In layman's language law is the prediction of what will happen to you if you do certain things. This was the lesson Holmes taught; and every lawyer on reflection knows that it is sound.

There are many reasons why this is so. No matter how clear and precise the code or other legal rule may be, the proof may be surrounded with doubt. And even though the proof is clear to the advocate, the credibility of the witnesses may raise serious questions for judge or jury. Uncertainty is increased when new and difficult problems under ambiguous statutes arise. And when constitutional questions emerge, the case is, as we lawyers say, "at large." For the federal constitution, like most

state constitutions, is not a code but a rule of action—a statement of philosophy and point of view, a summation of general principles, a delineation of the broad outlines of a regime which the Fathers designed for us.

These are the things that Holmes summed up when he described the lawyer's continuing and uncertain search for certainty. They indeed suggest why philosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it.

Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Feuhrer, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a Communist court dissenting against the decrees of the Kremlin.

Disagreement among judges is as true to the character of democracy as freedom of speech itself. The dissenting opinion is as genuinely American as Otis' denunciation of the general warrants, as Thomas Paine's, Thomas Jefferson's, or James Madison's briefs for civil liberties.

Democracy, like religion, is full of sects and schisms. Every political campaign demonstrates it. Every session of a legislature proves it. No man or group of men has a monopoly on truth, wisdom or virtue. An idea, once advanced for public acceptance, divides like an amoeba. The if's and but's and however's each claim a part; and what was once a whole is soon carved into many separate pieces, some of which are larger than the original itself.

LEGISLATIVE PROCESS ONE OF COMPROMISE

Those who have followed the legislative process can produce examples on end. That process is one of compromise—of qualifying absolutes, of creating exceptions to general rules. At times the process of compromise or conciliation involves well-nigh impossible adjustments. The clash of ideas may be so violent that a meeting of the minds seems out of the question. Where such cleavage is great and involves major issues, it may even tear a society apart. By the same token it can stop the legislative process or render it impotent, and thus deprive society of lawful and nonviolent means and methods of solving its problems. When the breach between the *pros* and *cons* is not too great, the legislative process functions. Even then, the compromise between competing ideas that emerges in the final legislation may be more apparent than real. For the legislative solution is often to write two opposing ideas into a statute. Without that solution enactment of the measure might, indeed, be impossible.

INTERPRETATION HAS LEGISLATIVE CHARACTERISTICS

And so the bill becomes the law and the law arrives before judges for interpretation. The battle that raged before the legislature is now transferred to the court. The passage of the legislation quieted the conflict only temporarily. It breaks out anew in the process of interpretation in the courts. A storm hits the court room, and the advocates take up the fight where the legislators left off. The same cleavage that appeared in legislative halls now shows up among the judges. Each side has eminent authority for its view since two conflicting ideas found their way into the legislation. It is therefore easy for judge or lawyer or editor to accuse the judge, who takes the opposing view, of usurping the role of the legislature. A more honest, a more objective view would concede that interpretation has legislative as well as judicial characteristics. It cannot be otherwise where the legislature has left the choice of competing theories or ideas to the judges.

The legislative process breeds dissension among judges in other ways. An hiatus may be left in a law. The crucial matter may have been too explosive for the legislators to handle. For that or for other reasons they passed it over entirely or left it vague and undefined. The necessity to fill in the gap is then presented to the court. And the judges are left at large in a field that the legislature lacked capacity to define. To a degree the same problem is presented to the judiciary when vague and general language is employed like the words "fair" or "just" or "equitable." The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed. A judge's reaction to vague statutory language is bound to be like his re-

action to the generalities of constitutional clauses. The language that he construes gathers meaning and overtones, significance and relevancy in terms of his own life and experience, his personal set of values, his training and education, and the genes of the blood stream of his ancestors. It would be as futile to argue that judges are not human, as it would to prove that politics and legislatures can be divorced.

STARE DECISIS HAS SMALL PLACE IN CONSTITUTIONAL LAW

When we move to constitutional questions, uncertainty necessarily increases. A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. For the gloss may, in his view, offend the spirit of the Constitution or do violence to it. That has been the experience of this generation and of all those that have preceded. It will likewise be the experience of those which follow. And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. *Stare decisis* has small place in constitutional law. The Constitution was written for all time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow, legalistic notions that dominated the thinking of one generation.

UNCERTAINTY NECESSARY FOR DEMOCRACY

So it is that the law will always teem with uncertainty. It has always been the case—and it always will remain that way under the democratic scheme of things. The truth is that the law is the highest form of compromise between competing interests; it is a substitute for force and violence—the only path to peace man has yet devised. It is the product of attempted reconciliation between the many diverse groups in a society. The reconciliation is not entirely a legislative function. The judiciary is also inescapably involved. When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition, for proclaiming their articles of faith so that all may read.

Chief Justice Hughes had this to say about the dissenting opinion:

"There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. * * * A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

That view was in the tradition of Thomas Jefferson who believed that the English practice of seriatim opinions was the desirable one. He thought each judge should write an opinion in every case so as to "throw himself in each case on God and his country; both will excuse him for error and value him for honesty."

JUDGES SHARE CRISES OF MODERN SOCIETY

The crises that face a democratic country under the stresses and strains of modern society are shared by judges. The judiciary is a coordinate branch of government, bearing great responsibilities. The judge that writes his own predilections into the law in disregard of constitutional principles or the legislative or executive edicts that he interprets is not worthy of the great traditions of the bench. The judge that quavers or retreats before an impending crisis of the day and finds haven in dialectics or weasel words or surrenders his own conviction for a passing expediency is likewise not born for the woolsack. We must expect of judges the fortitude and courage that we demand of all other servants who man our public posts. If they are true to their responsibilities and traditions, they will not hesitate to speak frankly and plainly on the great issues coming before them. They will prove their worth by showing their independence and fortitude. Their

dissents or concurring opinions may salvage for tomorrow the principle that was sacrificed or forgotten today. Their discussion and propagation of the great principles of our Charter may keep the democratic ideal alive in days of regression, uncertainty, and despair. Indeed what they do and say may in the manner of Holmes and Brandeis and Hughes have a more profound effect on the character of our government and the future of our country than the deeds of any other public servant. Moreover, their cool detachment and courageous objectivity can set the fashion of a day and stamp an era with a distinctive character.

Archibald MacLeish recently wrote of this age:

"What's changed is freedom in this age—
What great men dared to choose
Small men now dare neither win nor lose."

Judges, like other leaders of thought, must be free to choose—and, being free, must have the daring to let their inner conscience cast their votes. They must be free to speak their minds—and the legal profession must help create an atmosphere of understanding and tolerance for their efforts.

In these critical days leaders in every walk of life must dare choose, publicly and with pride, our constitutional scheme of things in all its applications. They must dare choose it above all lesser things and reject the easy invitation of expediency or complacency. When the leaders make that choice, men of lesser stature and affairs will dare stake their all for freedom.

The New Commercial Code

By WILLIAM L. BEERS

"The merchant, the banker and the ordinary man have a right to have ordinary transactions governed by laws they can understand."

A NEW COMMERCIAL CODE to be offered to the legislatures of all of the states and also to the Congress for application to interstate transactions is now in preparation under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. It will be a complete codification of the law relating to commercial transactions and include the law of sales, negotiable instruments, bank collections, investment instruments, and related fields.

THE NEED FOR A UNIFORM CODE

It is in the commercial field that the uncertainties of the common law may do the most harm and a statutory codification the most good. The primary purpose of such a code is not to fix penalties for wrongful conduct but to serve as a handbook to tell the average businessman what to do and what he may expect from others. Business people can adjust their dealings to fit the applicable rules of law if they know in advance, with reasonable certainty, what the rules are.

It is obvious to all that commerce is not organized on the lines of the political division of this country into states. A simple sales contract calling for shipment of goods from Louisiana to Wisconsin and payment by a draft drawn on Cincinnati and payable in Chicago shows how the rights and duties of the parties may depend on the laws of at least four states. The perplexing differences in the laws of the several states serve only as a burden upon legitimate enterprise.

PREVIOUS ACCOMPLISHMENTS

Previous efforts to achieve codification and uniformity have met with ready acceptance. The following is a list as of July 31, 1947, of the

Mr. Beers is a member of the New Haven bar and one of the Commissioners on Uniform State Laws from Connecticut. Much of this material was compiled by Herbert F. Goodrich, director of the American Law Institute. More detailed information will be found in the Handbooks of the National Conference of Commissioners on Uniform State Laws, the reports and proceedings of the American Law Institute, and the reports of the Commissioners on Uniform State Laws in the several states during the past few years.

adoption of acts on commercial subjects sponsored by the National Conference of Commissioners on Uniform State Laws:

Common Name of Act	Year of Promulgation	Jurisdictions Adopting
Negotiable Instruments....	1896	53
Warehouse Receipts	1906	52
Sales	1906	37
Bills of Lading.....	1909	33
Stock Transfer	1909	51
Trust Receipts	1933	24

WHAT WE HAVE NOW

The present lack of uniformity is due to several causes of which the following are among the most important:

1. The foregoing acts do not cover the entire commercial field. Many important subjects are not covered at all; e.g., the whole subject of investment instruments which is increasing in importance every day.

2. The incomplete adoption of these measures, as appears from the last column of the table.

3. Amendments to the foregoing acts which have been adopted in certain states with no attempt at uniformity.

4. Divergent construction of the same provisions by the courts of the several states. While some courts have accepted the spirit of uniform legislation and attempted to give uniform construction to uniform language, that, unhappily, has not always been the case.

5. Omission in the original acts. Can one stop payment on a certified check? The act is silent. It has almost nothing to say on the effect of forgery, alteration, negligence, estoppel. When the courts came to handle these problems, they took the act for what they could find in it, but naturally reached varying conclusions.

6. Lack of integration of separate acts. This answers the question of why we should have a whole new code instead of amending and completing the present acts. Business transactions are not separated according to legal concepts. The same transaction may involve a sale, negotiable paper, bank collections and others. A code should be drafted by looking at the business situation as a whole. A complete code will give an opportunity for the arrangement of the material in a manner that will be artistic and helpful. There must still be an index and plenty of cross-references, but the fundamental arrangement can guide the searcher to what he seeks.

7. Growth of new business practices. In the half century since the Sales Act was prepared, business needs and desires have developed forms and practices which could not have been foreseen. "Open term," "output," and "requirement" contracts have become common practice. Re-adjustable price terms, control of credit clauses, and sales "on memorandum," involve situations where the statute can furnish no guide. In the negotiable instrument field, the act which was drafted with ordinary commercial paper in mind does not cover with any certainty the matter of many modern banking practices including the use of clearing houses, signature guarantees, new types of corporate financing and the like.

THE START OF THE CODE

The matter came to a head when the New York Merchants Association prepared and secured the introduction in Congress of a new sales act to govern interstate transactions. It would indeed have been a calamity had this been passed without coordinated action on the part of the states. About the same time the American Law Institute was bringing to a close its series of restatements of various subjects of the common law and was looking for new fields of usefulness. By a stroke of real statesmanship these interests and the Conference were brought together. The New York Merchants Association agreed to withhold pressing the bill in Congress and a joint committee of the Conference and the Institute was established with the counsel for the New York Merchants Association cooperating.

COMMISSIONERS ON UNIFORM STATE LAWS

Beginning with a meeting held in August, 1892, at Saratoga Springs, New York, commissioners appointed by the governors of the several states have met yearly with the object "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable."

At the present time fifty-three jurisdictions are represented — the forty-eight states, the

District of Columbia, Alaska, Hawaii, Puerto Rico, and the Philippine Islands.

The intent has been to produce uniform acts that can be adopted in all states and that, because of the thorough consideration they have received, will not require amendments for many years. Especially in the commercial field, certainty and clarity are more important than theoretical perfection. Amendments to uniform acts largely adopted might make improvements, but at the expense of uniformity and stability.

The number of commissioners from most jurisdictions is three. A few states have more and in a few only one or two commissioners are serving. About one-fourth are members of law school faculties, a somewhat smaller fraction, members of the Bench, and the rest, practicing lawyers.

The Conference is held just before the annual meeting of the American Bar Association each year and lasts about a week. The preliminary drafting is done by committees, most of which work by correspondence, although a few of the more important ones hold meetings during the year. The commissioners receive no compensation for their services. Provision is generally made for travel and other expense although in some states the commissioners pay their own traveling expenses.

During its long history, the Conference has had a distinguished membership. Among the past commissioners were: Woodrow Wilson, Roscoe Pound, Louis D. Brandeis, James Barr Ames, Ernest Freund, John H. Wigmore, Samuel Williston, and William Draper Lewis. Justice Rutledge was at one time a commissioner from Missouri.

The present membership includes judges, professors and practicing lawyers of wide reputation. The revisers of statutes and heads of legislative reference bureaus of the various states are associate members.

THE AMERICAN LAW INSTITUTE

The Institute came into being in 1923 following the report of a committee of lawyers and professors known as "The Committee on the Establishment of a Permanent Organization for the Improvement of Law." Elihu Root was chairman and later honorary president of the Institute. George W. Wickersham was president until his death in 1936 when he was succeeded by George Wharton Pepper. William Draper Lewis was the committee's secretary and became the director of the Institute.

The principal undertaking of the Institute was the Restatement of the Law. The last volume was published in 1944. The material was subjected to long and continued discussion; first by a drafting group consisting of a reporter and advisers, then by the Council and finally by the general membership of the Institute. Every effort was made to make the work truly representative of the profession. Nearly every committee has included practicing lawyers, judges and professors. The representation is country-wide. The official membership includes, from each state, the president of the state bar association, the chief justice of the highest court, and the deans of approved law schools. The elected membership, about 800, is likewise country-wide. The Restatement has been highly successful and has been cited over 14,000 times by appellate courts.

DRAFTING METHODS

The setting up of individual committees and the handling of the work is in charge of a joint editorial board consisting of: William A. Schnader, Philadelphia, Pa., John C. Pryor, Burlington, Iowa, and Karl N. Llewellyn, New York, N. Y., representing the Conference, and Herbert F. Goodrich, Philadelphia, Pa. and Harrison Tweed, New York, N. Y., representing the Institute.

The content of the code will follow along these lines:

I General Provisions and Definitions
II Sales
III Commercial Paper
IV Bank Collections
V Investment Instruments
VI Bills of Lading and Warehouse Receipts
VII Chattel Security
VIII Commercial Agency
IX Miscellaneous

The chief reporter for the code as a whole is Karl N. Llewellyn, a commissioner from New York and a member of the faculty of the law school of Columbia University.

Hiram Thomas of New York, counsel for the New York Merchants Association who prepared the sales act which was introduced in the Congress, is an adviser on the sales chapter.

The advisers on the several chapters include practicing lawyers from all over the country.

For each subject the best expert in the country is selected as a reporter with appropriate compensation. The reporter holds frequent three to five-day conferences with his advisers and gives practically his full time to the work. When a preliminary draft is prepared after months of work, it is submitted to the Institute and the Conference at their separate meetings where they act independently. The material is considered section by section by each group and, with all criticisms and modifications, referred back for further study. In addition, it is the duty of the reporter to prepare comments, giving the state of the present law, conflict of authority, and reasons for change. These will ultimately be published along with the code and be an invaluable aid to its construction and use.

FINANCING

The cost of the preparation of the Code was estimated to be $250,000, at the very least. Through the generosity of the Falk Foundation of Pittsburgh, Pennsylvania, a grant was made of $50,000 per year for three years with an additional $100,000 at the end of the second year. Besides this, over $100,000 was secured by private subscription among banks, business houses and law firms throughout the country. Thus the funds are in hand to ensure the completion of the undertaking.

WHAT MAY BE EXPECTED OF THE CODE

The bar and the public have a right to expect and may expect a good code. It will be complete, well arranged and executed with a high degree of literary merit. It will be composed of short, concise sections couched in language as simple as legal accuracy will permit. A commercial code is not just for lawyers. The merchant, the banker and the ordinary man have a right to have ordinary transactions governed by laws they can understand. Services of lawyers are necessary in the enforcement of legal remedies and in the planning of more complicated undertakings, but well-intentioned businessmen should know, and that means they should have access to, the ordinary rules governing their trade.

Furthermore, the code will attempt to be fair. In trying to get beyond some of the antiquated rules of the common law, contracts running into pages of fine print have been devised, nearly all of which go too far in favor of one side or the other. These originally grew out of real business need. Some courts knock them all out and some, recognizing the business need, swallow them all whole. Either extreme is unjust. The code will take account of actual, real life customs and needs. The draftsmen do not study law books alone. They are in touch with representatives of all sides of commercial dealings to find out what is done, what the needs of business are, and what is fair. It will not be a code for the banks, or for big business, or for small business, but for all men, everywhere.

PROGRESS SO FAR

The sales chapter is completed and the comments are nearly finished. Work is going forward simultaneously on several of the other chapters. This has the added advantage of making it possible to see how similar problems arise in the different fields, so that the whole may be integrated in the code.

The plan at the present time is to have the work completed in its entirety by December 31, 1949, and it should be ready for submission to the legislatures immediately thereafter.

Although the Conference and the Institute are the instrumentalities engaged in carrying on the preparation of the code, they are the instrumentalities of the bar as a whole, of every state legislature, and of the whole body of citizens. They invite the interest, consideration and criticism of everyone during the progress of this work.

A just man is not one who does no ill,
But he, who with the power, has not the will.
—*Philemon.*

The Right of an Accused to the Assistance of Counsel

By JOHN R. SNIVELY

IN THIS HOUR when the freedom of the world is threatened by totalitarianism, it is important that we in America do not adopt the practices of the totalitarian state in order to destroy the increasing threat. History discloses that individuals have had a long, hard fight to secure the rights which are now recognized by civilized nations. These inalienable rights, which were won after centuries of struggle, are lost when dictatorship replaces democracy. Among the most important rights relating to the administration of justice are the right of the accused to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusation, the right to be confronted with the witnesses against him, the right to have compulsory process for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense. It is the duty of every government to protect and preserve these rights.

EARLY BACKGROUND OF THE RIGHT TO COUNSEL

Long ago the freedom of Christian leaders was threatened and violated. Jesus was "arrested" at night by "a great crowd with swords and clubs," which took him to the home of the high priest. No time for defense or honest testimony was allowed, nor did he have the assistance of counsel. False testimony was encouraged. The court was clearly prejudiced. It mattered little what the Accused might say in his defense. When he did speak, his words were considered blasphemous. Since he was said to have wrong ideas (not because he had committed wrong acts), it was said, "He deserves death." Immediately his accusers spat in his face and struck him. Within a few hours he faced Pilate, who yielded to the impulse of expediency, asked Jesus a few questions, and made no investigation. (Matthew 26.)

In Philippi, Paul was dragged before civil magistrates by the owners of a slave girl. Since Paul and Silas were accused by so many, the magistrates assumed that they had done something wrong and had them flogged as a matter of course. In those days it was considered that no one would tell the truth unless he was beaten. The accusation that Paul made of these magistrates who wanted him to depart quietly, shows that he appreciated the value of justice in court. (Acts 16:37.)

In the ancient world Roman justice was the best. However, when the Roman soldiers in Jerusalem saved Paul from the mob (Acts 21), the tribune ordered that he should "be examined by scourging, that he might know wherefore they cried so against him." (Acts 22:24.) Although the tribune took his prisoner to Caesarea for the sake of his life, Felix caused him to remain in prison for two years, "desiring to do the Jews a favor." When Festus wanted to take him to Jerusalem for trial, Paul made a final appeal to the supreme court of the empire, the court of Caesar, in Rome.

Yet Rome had Nero, an emperor who was more interested in poetry and drama than in justice. Therefore, after his famous fire anyone who admitted himself to be a Christian was by that very fact considered to be a criminal deserving of death by one cruel means or another.

In England Magna Carta was wrought from King John by the barons at Runnymede in 1215. Among other important grants, it provided as follows:

"No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed . . . except by the legal judgment of his peers, or by the law of the land. To none will we sell, to none will we deny, or delay, right or justice."

This grant, which is the most famous, was a guarantee of security against arbitrary rule.

In 1632, Charles I yielded to the demands of Parliament and agreed that he would not, without the consent of Parliament, allow persons to languish in prison without trial. How-

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Address before the annual meeting of the Section of Criminal Law of the American Bar Association, at Seattle, Washington, September 8, 1948. Mr. Snively is a member of the Rockford, Illinois, bar, and a member of the Council of the Section of Criminal Law.

ever, subsequent kings found it hard to keep these promises.

In 1688, when the British people determined to put an end to the Stuart dynasty, Parliament prepared a "Declaration of Rights" which stipulated the conditions under which they were tendering the crown to William of Orange and Mary, his wife. The following year this statement of principles was written into the Bill of Rights.

Originally, in England an accused was denied the assistance of counsel in treason and felony cases, except as to points of law arising on the trial or in collateral matters. For the rest his interests were in the hands of the trial judge. At the same time parties in civil suits and persons accused of misdemeanors were entitled to the full assistance of counsel. After the revolution in 1688, the rule was abolished relative to treason, but it was otherwise steadily adhered to until 1836, when the full right was granted by Parliament in felony cases.

The rule of the right to the assistance of counsel in petty cases, and its denial in the case of serious crimes, where such assistance was most needed, was constantly, vigorously and sometimes passionately assailed. As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For what face of reason," he said, "can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" (4 Blackstone Commentaries 355.) One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner, that is, was to see that the proceedings against him were legal and strictly regular. (1 Cooley's Constitutional Limitations, 8th Ed., 698 et seq., and notes.) But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused is dealt with justly and fairly. He cannot, however, investigate the facts, advise and direct the defense, or participate in the necessary conferences between the accused and counsel.

DEVELOPMENT IN AMERICA

In America the rule was rejected. In at least twelve of the original thirteen colonies, the right to counsel was fully recognized in all criminal prosecutions, except that in one or two instances the right was limited to capital cases or the more serious crimes. Today, in the United States and in most states, it is the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In a large number of states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a limited number to capital cases.

The practice in the federal courts is derived from the Sixth Amendment to the Constitution of the United States. It provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

28 United States Code 394, based upon the Act of September 24, 1789, provides as follows:

"In all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."

18 United States 563, derived from the Act of April 30, 1790, provides as follows:

"Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law. The court before which he is tried, or some judge thereof, shall immediately upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours."

These statutes are practically in the same form as when they were enacted in 1789 and 1790. They provided merely for a right of representation in the federal courts by the accused's own counsel and required the assignment of counsel by the court only on indictments for treason or other capital cases. There was little in the decisions of any court until Johnson v. Zerbst, 304 U. S. 458, in 1938, to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist an accused who did not engage his own lawyer, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired. In this case the Sixth Amendment was held to require the appointment of counsel in any criminal case in the federal court where the

accused had no counsel and did not waive the assistance of counsel.

The view of the Supreme Court of the United States as to the practice best adapted to the needs of the federal courts and most responsive to the requirements of the federal constitution and statutes as well as the decisions of the court, is now stated in Rule 44 of the Federal Rules of Criminal Procedure, which became effective March 21, 1946. It provides as follows:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

This rule is a restatement of the principles enunciated in Johnson v. Zerbst, 304 U. S. 458, Walker v. Johnston, 312 U. S. 275, and Glasser v. United States, 315 U. S. 60.

TREND TOWARD PROVIDING OF COUNSEL

It appears that there has been a gradual voluntary trend among the states toward the authorization of the appointment of counsel to assist the accused in his defense in all criminal prosecutions, with special consideration to the seriousness of the charge faced and to the actual needs of the accused under the circumstances of each case. Much of this trend has taken place since the adoption of the Fourteenth Amendment in 1868. It is neither universal nor uniform.

The Supreme Court of the United States has held that the failure to appoint counsel to assist the defendant or to give a fair opportunity to his counsel to assist him in his defense in a capital case in a state court violates the due process cause of the Fourteenth Amendment. (Carter v. Illinois, 329 U. S. 173.)

In a non-capital case in a state court, the Supreme Court has recognized the right of the accused to the assistance of counsel for his defense where there are special circumstances showing that otherwise the defendant would not enjoy that fair notice and adequate hearing which constitute due process of law. (Rice v. Olson, 325 U. S. 786.)

The failure of the common law record in a state court to show that the court inquired as to the defendant's desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist in his defense, or that such counsel was offered or assigned to him, does not violate the due process clause where the state law does not require such inquiry or offer. (Bute v. Illinois, 333 U. S. 640.)

THE ILLINOIS RULE

For several years the Supreme Court of the United States has been flooded with petitions, particularly from Illinois, alleging that the applicant has been deprived of due process of law and other constitutional rights. Recognizing the importance to the administration of justice and to meet the situation, which was severely criticized in Marino v. Ragen, 332 U. S. 561, the Supreme Court of Illinois solicited suggestions from the bar. At the request of the court, a committee consisting of members of the Illinois State and Chicago Bar Associations, met with the court and discussed the promulgation of a rule relative to the appointment of counsel. The committee drafted a proposed rule and submitted it to the court. At the May term a rule was adopted which became effective September 1, 1948. It provides, as follows:

"In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he has a right to counsel, and understandingly waives such right. The inquiries of the court, and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become part of the common law record in the case; provided, in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years, unless represented by counsel."

This rule is the first of its nature to be adopted by any state court. It is broader and more far reaching than the provisions of any constitution or statute or the federal rule.

First, the rule applies in all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary. Thus, it includes non-capital cases as well as capital cases.

Second, not only does the rule provide that if, at the time of arraignment, the accused is not represented by counsel, the court shall, before receiving, entering or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel; but it further provides that if he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. This provision emphasizes not only that the court shall appoint counsel but that it shall appoint competent counsel. It is indeed important that an accused shall have competent counsel, particularly in a capital case.

The rule further provides that the court shall not permit the waiver of counsel or a plea of guilty unless the court finds from the proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he has a right to counsel, and understandingly waives such right. If a waiver is to be effective, the Supreme Court of the United States has said that "it must be intelligently, competently, understandingly and voluntarily made."

The rule further provides that the inquiries of the court, and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become a part of the common law record in the case. This provision furnishes additional protection to the state as well as to the accused.

And lastly, the rule further provides that in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years unless represented by counsel. From time immemorial the law has recognized the incapacity of minors, particularly in civil matters, such as the incapacity to contract, to sue except by his guardian or next friend, to appoint an agent or attorney, and to vote. It has been zealous in the protection of minors. This provision establishes a new and additional safeguard for our youth. It has long been needed. It should also be extended to misdemeanors.

The adoption of this rule demonstrates an alertness of the Supreme Court of Illinois to the need of improving and strengthening the human rights of individuals as well as to furnish the state with an adequate and effective means and procedure to sustain convictions that have been justly and fairly reached. It is stimulating and wholesome to have a court take such forthright action. It is also an additional guarantee that the accused will have a fair trial. The court has pointed the way to new horizons in the administration of justice and deserves great credit.

In recent years there has developed a renewed and increased interest in the essential human rights. Every individual owes a great personal responsibility for the achievement and preservation of these rights. This is indeed a great challenge.

One of the prime elements of an efficient judicial tribunal is impartiality and freedom from prejudice, and yet it is proverbially admitted that before an average jury in a negligence case a corporation stands less chance of judgment on the merits than an individual, an employer than an employee, a religious opponent than a co-religionist, a member of a different race than a member of the same race.—*Charles A. Boston*

The Public Defender System Is Unsound in Principle

By WM. SCOTT STEWART

"It is a mistake to believe that any public official can take the place of the lawyer for the defense."

In *Marino v. Ragen*, 332 U.S. 561, the Supreme Court of the United States referred to the Illinois system of criminal justice as a merry-go-round and a labyrinth of blind alleys. Our state receives a black eye before the nation because we persist in the railroading of persons to prison in a hurry, without the safeguards of a fair trial. If the prisoner could be shot, put in an oven, or otherwise silenced, nothing would be heard of him and the officials would not be embarrassed. Our penitentiary wardens made a try for this goal by refusing to allow any prisoner to mail a petition for habeas corpus. This only served to dam the flood for a time. Judge Barnes took the officials to task, and now, because a federal judge has publicly announced that even prisoners have some rights, the prisoners have concluded that the federal government stands ready to correct the mistakes made in the local courts. In order to arrive properly in the federal courts the prisoner must first exhaust all remedies afforded by the state. This rule has brought a flood of state litigation, known to be of no practical value, intended to pave the way for a federal hearing. Our former attorney general fought these petitions at every stage, insisting upon strict compliance with every rule. The petitions are drawn in the penitentiary by laymen and are contested by lawyers of skill and experience, hired for that purpose by the state. So, nationally, we present the sad spectacle revealed by *Marino v. Ragen*. We should have a housecleaning.

One reason why we find ourselves in this unenviable position is that we have a public defender system in Cook County. It is a mistake to believe that any public official can take the place of the lawyer for the defense. In Chicago the public defender is appointed by the judges, to serve until removed, or during good behavior. Under the law the judge in theory is supposed to protect the rights of the accused. We know that in actual practice the judge is not in a very good position to do so. The public defender is really the agent of the judge. He owes no duty to his client, other than that which he believes to be imposed by the judge, whereas a real lawyer for the defense knows no master but his client. How far his duty should take him is governed by the law and a code of ethics, to say nothing of his character and training.

PUBLIC DEFENDER IS NOT AN ADVOCATE

An independent bar is one of those necessities taken for granted—so much so that an encroachment is not at first recognized as such. A lawyer is not an advocate any longer, or should not be after he is elected judge. I say a lawyer is no longer a defense lawyer after he becomes a public defender. If he be elected to the position I don't see how that will help the situation. To whom will he be responsible? How will he go about the business of getting himself re-elected—by winning cases? If you say that he can make a good record by seeing that justice is done in each case, you will put your finger on a sore spot. That is one of the troubles with the system. The public defender is called upon to make decisions as a public official—sometimes against his client. Our public defender refuses to petition for a change of venue, even when requested by the defendant. If the prisoner claims an alibi the public defender gives subpoenas to the sheriff and puts such witnesses as may appear on the stand without an interview. He is so anxious not to be thought to have helped a fabricated defense

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Mr. Stewart is a member of the Chicago bar. Readers are invited to compare his arguments with those of Donald Freeman in his article on the same subject in the October JOURNAL and to check them against their own experience and observation in this field. This discussion originated in the *Michigan State Bar Journal*, in which Mr. Freeman's article first appeared, and which published in the same issue an earlier article by Mr. Stewart in reply thereto. See also Mr. Stewart's book, *Stewart on Trial Strategy*, (Chicago, 1940), pp 1382-1442.

that he leans over backward. How can it be said that the defendant secures the same representation he might have had with a lawyer? If the State finds itself unable to prove some element of the crime, because of the absence of a witness, or some such reason—an element like the cause of death in a murder case, or the ownership of property in larceny or burglary—the public defender will stipulate the needed fact. He does not wish to cause any "unnecessary" delay. He must often decide between his own interest and that of his client. He must try his cases to please the judge and not be too critical of the prosecutor. Of course, we know that the private lawyer must often run counter to the wishes of the judge and an attack upon the conduct of the prosecutor often becomes a duty.

Our public defender will not advise one under examination to stand upon his right to silence; he will not sue out a writ of habeas corpus to interfere with any third degree. Such might be the tactics of a real defense lawyer, but the public official will have no part of it. He even neglects to ask for a continuance, in spite of the fact that our Supreme Court has held it to be reversible error to deny a reasonable time in which to prepare. We have had the spectacle of shots fired on a Monday followed by a death verdict nine days later. The arrest was made on the day of the shooting, the indictment returned the next day. The jury was selected, the evidence heard, and the verdict returned fixing the death penalty all on the same day, with judgment on the following day. In just such a case I was unable to obtain a supersedeas, because the record left nothing to review. How could I complain that the defendant should have had a continuance when the public defender did not request one? How could I say that he should have put the defendant upon the stand or should have produced witnesses when the record failed to show what might have been proved? I could not claim that the public defender was incompetent, because in fact he was a lawyer of experience and ability. I was not permitted to attack the legality of his office because such a charge will not be heard collaterally.

There has been a change of administration since then and we have a new public defender. I say this because I believe the new man would like to have me mention that he is trying to do a good job. I have confidence in his ability and do not doubt his sincerity, but he too will find it impossible to render the service of the lawyer. He cannot, because of his position, satisfy the essentials of due process.

APPEALS ON FAR-FETCHED POINTS

The public defender does not even request a new trial. He makes no record of any use in a court of review. If another lawyer is called in after conviction he is asked to lock the barn after the horse is stolen. The public defender has taken some cases to the Supreme Court, but they have been sham battles, or moot cases, or cases involving some fine farfetched point which attracted his interest, as, for instance, his argument to our Supreme Court[1] that the public would be better served if the defendant were committed to the penitentiary so that the other prisoners might see in him a living example. The prisoner was executed. Such was his argument to the jury in the one-day case referred to above. A lawyer in private practice who made such an argument in two death cases, would not be appointed in the third, for fear that the Supreme Court would question his competency.[2]

Along with the growth of our system of criminal jurisprudence, certain necessary rules have been developed. Every lawyer knows the restrictions upon so-called newly-discovered evidence. The upper courts cannot permit cases to be tried over and over again, so, before such evidence can bring about a reversal, the defendant must show not only that the fact was unknown to him, but that he could not have known it in the exercise of due diligence. The knowledge of his lawyer is the defendant's knowledge, and that which the lawyer could have learned is charged to the defendant. These rules were established to apply to the lawyer. Public policy would not permit a litigant to choose his lawyer and then turn around, after he lost, and secure a new trial because his lawyer was incompetent or negligent. This rule was modified in the case of a poor person. The

1. *People v. Scheck*, 356 Ill. 56, 65.
2. *People v. Blevins*, 254 Ill. 381, 389; *People v. Nitti*, 312 Ill. 73.
3. *People v. Blevins*, 254 Ill. 381, 389. "It is intended that only persons qualified by learning, intellectual capacity, and good moral capacity shall be permitted to defend in a court of justice the life or liberty of a person charged with crime." *People v. Nitti*, 312 Ill. 73.

judge was given the responsibility of appointing only lawyers of competence.[3] But after these rules have grown up, and it is seen that they must work hardship in some cases, but still must be enforced, along comes the public defender system to upset the entire balance. We must either modify the rules or abolish the system. For the present we have the scandal of numerous prisoners claiming that the State of Illinois has deprived them of due process. They are being defeated in the State Courts by the application of rules which were made for a different system. They are now arriving by the hundreds in the Supreme Court of the United States, claiming not only that there is not justice in Illinois, but that the State accords no machinery by which they may be heard.

WORK OF PRESSURE GROUPS

I am sorry to have to report that we have certain pressure groups working constantly at making the task of the prosecutor an easy one. They gained a great victory when they established the public defender system. They cause bills to be introduced intended to throw the burden upon the defendant to prove his innocence, to make perjury convictions easy to obtain, and to undermine the right of one not to give evidence against himself.

If one should propose a like system for the probate court, the bankruptcy court, the equity court, the divorce court, and the personal injury cases, many of the lawyers who now think that it is all right in the criminal court could see some of its defects. And I don't mean to say that the civil lawyer would protest merely because a public official was to take his business and his fees. The civil lawyer would know that no such system could be worked. Why expect it to work in the criminal court?

It is almost impossible for the layman to understand why the guilty should be accorded every right in order that the innocent be protected—that there cannot be one method of trial for the guilty and another for the innocent. The lawyers have a public duty to see that the necessary safeguards are not frittered away. Why favor a system which only makes it more difficult for the underdog to secure a fair trial? You must give everyone his day in court. It is evidently difficult for some to understand that the courts are made for the purpose of sifting the truth from the false. You cannot stop perjury with jail sentences for witnesses, but you can stop the witnesses from daring to attend. You cannot correct the abuses of the private enterprise system by substituting a public official for the lawyer. It is a great mistake to regard as paupers all persons before the bar without ready means to hire a lawyer. They must be given a little time to make their own arrangements. They may not be able to hire the best, but most of them will be able to hire a lawyer of more value than the public defender can be—one who will take the time necessary to listen and confer and who will do a little leg work.

No lawyer in practice could retain his license, to say nothing of his reputation, if all of his clients accused him of being a party to a conspiracy to railroad him to prison. He could defend himself as against a few such charges, but if they became numerous he would find himself in trouble with the judges. The lawyer, if he didn't already know it, would soon find that his very professional existence required him to give his client proper representation. Every law student knows that that requires careful preparation of each case. When the prisoner complains of the public defender, he complains of an official. The other officials,—the judge, the state's attorney and the sheriff—stand with the public defender. The prisoner finds himself alone. The officials cannot afford to admit that the system makes it easy to ride over the rights of all defendants. We have even seen a judge appoint the public defender as a friend of the court in cases where the prisoner complained that the public defender did not properly present his case. Our public defender objects to such practice but could do nothing about the judge. No lawyer would tolerate such a situation for a moment.

GOING THROUGH THE MOTIONS

No judge could keep his self-respect, let alone the respect of the bar, if he persisted in appointing a lawyer for the defendant who merely went through the motions of pretending to be a lawyer for the defense—one who stipulated his client into the penitentiary, persuaded him to waive a jury, or caused him to plead guilty to save time. But the same judge can appoint a public defender day after day who does just that, and because of so much propaganda in favor of the system, nobody cares.

I could not begin to explain the duty of the lawyer to his client. At times we must protect him from himself and not permit him to manage his case or put in a certain defense. The law recognizes that this must be a relationship of mutual confidence. How could any public official hope to take the place of the lawyer, no matter what the intentions of the official might be? The defense of a criminal case is a great responsibility. No lawyer would undertake to defend properly the volume of cases put upon the public defender. Why should any defendant be so handicapped?

The public defender never bothers very much to see if the prisoner is really unable to hire counsel. The lawyer in private practice who is appointed in a case will not permit himself to be used where he finds the parties able to pay a fee. He will complain to the judge and ask to be relieved. I have yet to learn of any case in which a public defender reported to the court that the prisoner could afford to hire his own lawyer. I do know of cases where the public defender was put on notice that the defendant had means, where he had paid a surety company for a bond. The fact seems to be that the cases are less bother for everyone in the hands of the public defender. No one seems to wish to disturb the procedure. The defendant and his family do not complain. The case will most likely be disposed of on a plea of guilty, or a jury will be waived and the evidence stipulated or shortened up. No bothersome jury trials, no tedious cross-examinations, no defense witnesses. If the object of the courts were to make it comfortable for the judges, easy for the prosecutor, and to save time, the public defender system would be ideal. Lawyers insisting upon the rights of their clients can be an awful nuisance.

To my mind the system is one of those noble experiments like the prohibition laws. The general public is compelled to learn the hard way, that human nature is not to be legislated into a different pattern.

Fourth Circuit Dispenses with Transcript of Record; Will Hear Appeals on Original Papers

The hearing of appeals on the original papers constituting the record in the trial court, rather than on a copy, or "transcript" of those papers, is provided for in a new rule of the United States Court of Appeals for the Fourth Circuit, adopted on October 14 and effective December 1, 1948.

The Fourth Circuit is the first jurisdiction to adopt such a rule, which was authorized in the new subdivision (o) of Rule 75 of the recently revised Federal Rules of Civil Procedure, and also in Rule 39 (b) of the Federal Rules of Criminal Procedure. The Court of Appeals adopted it upon the recommendation of the Fourth Circuit Judicial Conference held at Asheville, N. C., last June, after Claude M. Dean, clerk of the court, had advocated it before the Conference.

Rule 75 (o) provides that "whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75 . . ." The Advisory Committee's note explained:

"The addition of Subdivision (o) to Rule 75 is in response to the suggestion of circuit judges that such a provision would be helpful to those circuit courts of appeal which desire to permit the transmittal of the original papers in the proceeding rather than a copy or a 'transcript' of the papers. This course avoids the delay and expense entailed by the preparation of copies, and gives the appellate court the advantage of having before it the original papers just as they were presented to the trial court. It appears particularly appropriate for those appellate courts which by rule have dispensed with formal printing of the record."

Rule 39 (b) (2) of the Federal Rules of Criminal Procedure provides that "The circuit court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record." The advisory committee's note merely points out that this brings criminal practice into line with civil practice, but Professor George H. Dession, a member of the advisory committee, speaking

at the New York University institute in February, 1946, remarked:

"There was considerable discussion of this in the committee, and the rule as it finally came out of the committee simply provides that the circuit courts of appeals may dispense with printing the record. It doesn't require them to do so. So here each circuit would continue to make its own rules. The committee obviously was a little bit interested in seeing the expense of printing eliminated if it could be. From a layman's point of view it is hard to see why you should publish books every time you want to get an appeal heard."

In a letter to the members of the bar practicing in the Fourth Circuit, Mr. Dean declares that the new Rule 9 is designed to and will accomplish the following three important purposes:

"1. It will minimize the work of the clerks of the district courts in not having to make typewritten copies of transcripts of records. It will also enable those clerks to transmit appeal records to the appellate court more speedily, and thereby obviate delays in having appeals docketed and heard in the Court of Appeals.

"2. However, the primary purpose of this new rule is to save expense to litigants. Under this rule litigants will not have to pay the clerk of the district court a fee for making up a typewritten transcript of the record, since, under this new rule, the clerk is directed to use the original papers in making up records on appeal, and the litigant will therefore only have to pay the clerk a nominal fee for such a record on appeal.

"Premising my calculations on one hundred cases, the statistics of my office show that the average number of pages in transcripts of records, under the old rules, is 260, and the average cost of same under that rule is $104. Under the new rule the average cost of a record on appeal should average about $4. The saving to litigants in these 100 cases will therefore be about $10,000."

"3. While the new rule avoids delay and expense entailed by the preparation of copies, it gives the appellate court the advantage of having before it the original papers just as they were presented to the trial court. It will be particularly appropriate for those appellate courts which by rule have dispensed with printing the entire record and have directed that only portions of the record need be printed."

Six years ago the Fourth Circuit pioneered another move in the same direction when it adopted its Rule 10 providing for the printing of relevant portions of the record as an appendix to the briefs rather than printing the entire record. See Claude M. Dean, "Fourth Circuit Rule 10 Reduces Brief Printing Costs," 26 J. Am. Jud. Soc. 148 (Feb., 1943).

Wisconsin Bar Association Reorganizes

A new constitution resembling that of the American Bar Association in important particulars is now being put into effect by the Wisconsin Bar Association following its adoption at the 1948 annual meeting.

The chief governing agency of the organization is to be its House of Governors, a body comparable to the A. B. A. House of Delegates. County bar associations are chartered by the state association as "component bar associations," and the House of Governors is made up of representatives of these associations in the proportion of one governor for each fifty members or fraction thereof, with a minimum of one from each component association. The House will exercise general control over the affairs of the Association and will formulate its general policies.

This arrangement will go far toward achieving a "de facto" integration of the Wisconsin bar, conventional integration having been denied it by a 1946 decision of the state supreme court. Although there is and can be no compulsion on the local associations to affiliate with the state organization, the chance to have a share in its management is one that few or none of them will care to ignore, and, with them all in, the state association will truly represent the entire bar of the state.

A Council, with powers corresponding to those of a board of directors, will consist of the president, the president-elect, the last retiring president, and nine elected members, one from each state bar district. This body, in both organization and powers, is a prototype of the A. B. A. Board of Governors. An executive committee, consisting of the same ex-officio members and one to three of the elected Council

members, will serve as an interim advisory body. The president-elect, chosen a year in advance of the time he assumes the presidency, will come to that post well prepared by virtue of his ex officio membership on the Council during the preceding year. An executive secretary is provided for. The Assembly is almost identical with that of the A. B. A., consisting of members present at Association meetings, with power to pass resolutions and make recommendations to the House of Governors.

The best part of the new constitution is Article II, the finest summary of objects and purposes of a bar association we have seen. The Association ought to have it printed in appropriate style and type and distribute it to its members to be framed and hung on their office walls. Here is its text:

"This Association is formed to bring into one organization the legal profession of Wisconsin, to advance the science of jurisprudence, to improve the administration of justice according to law, to promote legal reform, to elevate standards of integrity, education and public service among the members of the legal profession, to safeguard the proper interests of that profession, to promote friendly relations among its members, and otherwise to assist the bar of the state in fulfilling its social and professional responsibilities."

Survey of State Bar Membership

The following tables show the results of a compilation of statistics regarding bar membership in the state bar associations of the country. The information was obtained from state bar officers who completed questionnaires containing a variety of questions regarding the organization, publications, services rendered, and numerous other activities of the bars in the various states. Other information obtained through this survey has been published in previous issues of the JOURNAL, and further information will be published in subsequent issues.

The estimates of the total number of lawyers in the individual states were taken from the Report of the Special Committee on the Economic Condition of the Bar of the American Bar Association for 1945, Reports of the American Bar Association, Volume 70, pages 296-7, and were the latest figures available.

It is evident from the tables following that the bar membership in a number of states has increased substantially since 1945. This is especially obvious in the states which have integrated bars, since in those states all practicing attorneys are members of the state bar association.

A dash in a column indicates that no members are listed in the state roster of membership under the given categories, while the dotted spaces indicate a lack of information.

It will be noted that the totals of the figures for the various categories of members in a state association will not equal the figure for total members in all cases. This is due to the fact that some of the bars regard their special memberships as conferring a separate status on those members. For example, one state bar might include all members—regardless of category—in the total membership figure, whereas another might not include honorary, life, or some other category in the total figure. This, of course, has in some cases resulted in an irreconcilable variation when an attempt is made to balance the figures horizontally.

NOTES TO TABLE ON OPPOSITE PAGE

1. Integrated bar.
2. Includes sustaining members, who contribute $25.00 annually.
3. Special (over 75 years of age)—16; military—3.
4. Associate members.
5. Included in total for regular members.
6. The judiciary.
7. Privileged.
8. Affiliated associations.
9. Federal judges.
10. All memberships are combination state and local.
11. One-third of regular members.
12. Most non-residents are included in the total for inactive members.
13. Seven of the honorary members are non-residents.
14. Active members.
15. Many non-resident members have been admitted to practice.
16. Includes supreme court justices.
17. Junior bar section includes members under 35, who are also regular members.
18. Resident.
19. Includes one honorary non-resident.
20. Includes 56 inactive non-residents.
21. Associate members.
22. The voluntary association.
23. Retired. (According to the new Wisconsin Bar Constitution, life membership is a species of honorary membership obtainable after 40 years of active membership. Life members are to be exempted from dues. Generally, as in the American Bar Association, an active member may become a life member at any time by paying a fixed sum in lieu of annual dues.)
24. Retired.

STATE BAR ASSOCIATION MEMBERSHIP

State Association	Total Lawyers 1945	Total Members 1948	Regular	Junior	Life	Honorary	Inactive	Non-resident	Combination State-Local	Other
Alabama[1]	1621	1400	1400							
Arizona[1]	557	1000	825			25	150			
Arkansas[1]	1475		857	62						19[2]
California[1]	12750	14924	13655				1269			
Colorado	1467		1387[3]			27		4	1387	
Connecticut	1927	1200	1200							
Delaware	207	199	199							
District of Columbia		2213	1976			30				207[4]
Florida	2682	2126	2126						2040[5]	
Georgia	2588	2100	2100	100				100		
Idaho[1]	430	485	485			5-6		28[5]		
Illinois	12043		5950	228	56	32		250		300[7]
Indiana	3808	2100	1700	400				25		
Iowa	2944		2310		45					
Kansas	1815	1500	1495				5			
Kentucky[1]	2399	3250	3175			75				
Louisiana[1]	2005	2600	2600	654[5]		100[8]				
Maine	775	569	567			2				
Maryland	2515	960								
Massachusetts	7344	2700	2500	100		100		40		15[9]
Michigan[1]	5071	7389	6729				660			
Minnesota	3020	2400	2100	300		9			10	
Mississippi[1]	1305	1500	1400	11						
Missouri[1]	5229	6000	6000							
Montana	569	400	400							
Nebraska[1]	1928		1950	175			750	12		
Nevada[1]	225		241			22[13]	36	65[14]		
New Hampshire	385		330			1				
New Jersey	5441	1832	1610	222	1			26		
New Mexico[1]	377	557	426				85	46		
New York	30890	6600	6300	725	150	150	25	15		
North Carolina[1]	2408	2700	.....	.....	.....	.....	.....	.....	.....	.....
North Dakota[1]	507	550	550							
Ohio	8943	5373			17[16]	10				
Oklahoma[1]	3335	4600	4000				600			
Oregon[1]	1308		1872				253			
Pennsylvania	8416	4200			7					
Rhode Island	684	600	570			30				
South Carolina	1033	300				40				
South Dakota[1]	627		700				130			
Tennessee	2549	1581	1139	350		82				
Texas[1]	7116	9300	9300	17				500[5]		
Utah[1]	569	874	656[18]			22[19]	33[18]	163[20]	710	
Vermont	342		342			4		27		
Virginia[1]	2321		2835			65	300[21]			
Virginia[22]			1450		6	45				
Washington[1]	2219		2485			7	317			
West Virginia[1]	1398		1470				150			
Wisconsin	3344	2794	2500	400[5]	220[23]			74		
Wyoming[1]	258		286			11[8]		36		31[24]

(*Footnotes on opposite page*)

Sound Recording of Courtroom Proceedings Widely Approved

Numerous instances of the use of sound recording devices in court rooms have been brought to the attention of the JOURNAL as a result of the publication of Judge Marshall F. McComb's inquiry in the June issue.

Judge William Haralson of Hattiesburg, Mississippi, reports the use of an electronic device known as a "Soundscriber" to record trials in the County Court of Forrest County since January, 1945. The following description of it was published in the *Hattiesburg American* on February 28, 1945:

"A compact little instrument known as the soundscriber may revolutionize court proceedings as well as business office procedur " and correspondence.

"Supposedly the first complete court trial in the world has been electrically recorded and transcribed in Forrest County Court.

"Almost any audible sound may be recorded on this small device, which consists of two machines, a recorder and a transcriber. Correspondence may easily be carried on via this means.

"Small green plastic discs placed on a turntable in the machine record the sound. The mere rattle of paper may be caught in this intricate instrument. The soundscriber, which is somewhat similar to a dictaphone, is much less costly and easier to operate.

"The discs, which are only about ten inches in diameter, are grooved with a needle much finer than a phonograph needle. A fully recorded disc is from eleven to fifteen minutes long.

"Because of its accuracy and saving of time the soundscriber is expected to be a part of every office and court within a few years. This instrument will not replace the stenographer, but will be an aid to her as well as to other users."

The newspaper suggests that the case mentioned (Brannon v. Morrison, No. 5936, January, 1945, term) may have been the first complete trial thus recorded in the world. None of the others reported from other localities appear to have been in use earlier than that date, but Judge Haralson is interested in verifying, if possible, the fact that his court was the first to use that method of recording its proceedings. Judge Haralson notes that no legislative sanction ever has been given to its use, but that lawyers consider it more accurate than shorthand reporting and that no objection to its use has ever been raised. In one instance an operator left during the course of a case, and the recordings were readily transcribed by another court reporter.

Similar devices are reported by Hattiesburg lawyers to be in use in the county courts of Laurel and Meridian, Mississippi, and in the circuit court in Mobile, Alabama.

Joseph L. Lenihan of Louisville, Kentucky, reports that such a machine is in use in the United States District Court for the Western District of Kentucky in Louisville, and John A. Kiely reports the same true of the federal court in Covington. Disclaiming familiarity with the technical details of its operation, Mr. Lenihan states that the operator has on the table in front of her a small machine containing two turntables using record discs about six inches in diameter. When the record on one turntable is nearly filled the machine gives a warning and the stenographer switches over to the other turntable. Four small microphones are used, one for the judge, one for the witness on the stand, and one for each of the opposing counsel. The court apparently does not rely upon the recording device exclusively, as the stenographer appears to take down at least part of the proceedings in shorthand.

Travis Oliver of Monroe, Louisiana, states that such a system has been in use for some time in the Fourth Judicial District of Louisiana, which holds sessions in Monroe and Bastrop. It has proved most satisfactory from the standpoint of the attorneys practicing before that court and is very well liked by both the judges and the reporters.

Use of sound recording by Charles T. Diffendaffer, court reporter for the United States District Court for the Eastern District of Oklahoma, at Muskogee, Oklahoma, was reported by both Francis Stewart, assistant U. S. Attorney of Muskogee, and by Murray F. Gibbons. Don Welch of Madill says the Oklahoma Corporation Commission is using it. Travis White, City Attorney of El Paso, Texas, reports use of one sound recording system for more

than a year in the Forty-first District Court of which David E. Mulcahy is judge, and systems of different design more recently installed in the district courts of the Thirty-fourth and Sixty-fifth districts and the County Court at Law.

Judges or reporters interested in investigating the possibilities of this system for their own courts can doubtless secure further details by writing to the judges or clerks of any of these courts. The JOURNAL would like to hear from any judges, lawyers, clerks or reporters whose opinion of sound recording, after trying it, is unfavorable.

California, Arkansas and Columbus, Ohio, Bar Associations Win A. B. A. Award of Merit

The state bar associations of California and Arkansas and the local bar association of Columbus, Ohio, were the recipients of the annual awards of merit presented by the Section of Bar Activities of the American Bar Association at the 1948 annual meeting.

The State Bar of California won the award to a large state association on its public relations program, its program of post-admission legal education, its campaign to suppress the unauthorized practice of law, and its work on improving the standards and quality of California law schools.

The California public relations program, begun in 1941, distinguished itself this year in the fields of publicity and community relations. State bar releases reached four million readers through every newspaper in the state, and were conveyed to many times that number through publication in other papers large and small from coast to coast. Fifty correspondents, including forty from out of the state, covered the 1947 convention, and the bar had coast-to-coast publicity over every major radio network. The community relations program is intended to bring the rest of the public in the same friendly relationship as those people who through personal or professional contacts with individual lawyers have had a chance to become acquainted with it. This depends upon the efforts of individuals, and the program during the past year consisted of preparatory meetings with local bar groups looking toward an active campaign during the year ahead.

The State Bar led in establishing a permanent co-operative enterprise involving local associations, the State Bar and the Extension Division of the University of California, through which courses in taxation and wills and estates were given to some 1,500 lawyers. Twice as many are expected in future years, when evidence and trial tactics and community property and domestic relations courses also will be offered. A law school accreditation system based on percentage of graduates passing the bar examination, with gradual stepping up of requirements, has brought about such improvement in instruction and quality of students in California law schools that the percentage of applicants passing the examination has risen from 53 to over 90 in ten years, although graduates of accredited schools outside of the state still average only 56 per cent. A $20,000 survey of the entire bar admission program has now been undertaken, with disinterested authorities from out of the state in charge, to cover laws schools, curricula, instruction, admission procedure, examination questions and grading, and other matters.

Two outstanding projects completed after years of work won for the Bar Association of Arkansas the award to a smaller state association. The first was the drafting of a new probate code, begun in 1938, and following closely the A. B. A. model code. This was approved at the last annual meeting, published with funds contributed by individual lawyers, and readied for submission to the Arkansas legislature. The second was the drafting of a comprehensive plan for reorganization and unification of the state judiciary, begun three years ago and presented in final form at the 1948 annual convention.

The Columbus Bar Association won the local association award with a diversified program including institutes on taxation and on prac-

tical legal problems, an educational noon luncheon lecture series, sixteen radio broadcasts entitled "Your Lawyer and You," joint conferences with realtors, trust officers, accountants, life underwriters and physicians, drafts of new U. S. District Court rules and a jurors' handbook for the Court of Common Pleas, a lawyer reference service and free legal aid service.

Survey of California Legal Education

Legal education is the subject of a thorough survey recently commenced by the State Bar of California. In charge of the survey is an impartial board of non-resident experts with long experience in the field of legal education, consisting of Joseph A. McClain, Jr., and Thomas F. McDonald of St. Louis, and Sidney Post Simpson of New York. They will consider the character and effectiveness of legal education in its numerous aspects and in addition will carefully review the present method of administration of bar examinations, the character of the questions asked, and the methods of finally determining the results.

The first step in the survey, the distribution of a comprehensive questionnaire, has already been taken. The questionnaires have been in the hands of the deans of the California law schools since September 1, and it is expected that the committee will be able to begin evaluating the results of this inquiry this month. The second phase, a field investigation of physical factors and teaching technique, will begin shortly after. The State Bar of California has appropriated $20,000 to finance the survey.

Paragraphs

Five-sixths jury verdicts in civil cases are among the innovations introduced into New Jersey practice along with the new constitution on September 15. The verdict may be by ten jurors in a twelve-man jury or by five in a six-man jury.

Improvement of Administration of Justice of the Peace Courts is the object of a committee of the Iowa State Bar Association which has been meeting monthly to study and prepare legislation to that end which, if approved by the Board of Governors, will be sponsored in the 1949 General Assembly.

Upon beginning its 98th year on October 5, the docket of the Ohio Supreme Court was more nearly up to date than it has been for some years. On that date there were pending 62 cases admitted to review as compared to 110 such cases at the beginning of the term last year.

The Reader's Viewpoint

Just a Coincidence?

To the Editor:

I had just finished reading the editorial "A Doubter Asks for Proof" in the October JOURNAL when I picked up the *Pittsburgh Post-Gazette* of Wednesday, October 20, and read the enclosed clipping. If the editor of *Collier's* desires more statistics, I believe he could get plenty by communicating with the police authorities throughout the country. A short time ago, the newspapers reported the case of a young boy who killed his brother in an argument having to do with the "comics." This happened at New Castle, Pa.

BENJAMIN H. THOMPSON.

New Kensington, Pa.

From the enclosure:

"A short but vicious life of crime was laid at the feet of 'comic books' Tuesday.

"This time by the father of Joseph Manuel, lanky slope-shouldered youth of 16, who climaxed a six-months' crime spree with the wanton slaying of a Wilkinsburg salesman.

"Young Manuel pleaded guilty Tuesday to eight charges of armed robbery and one of larceny. Wednesday he will plead guilty to murder, according to his attorney, Earle R. Jackson.

"It was more by way of explanation than defense that the youth's father, Samuel Manuel, a barber, of 3830 Liberty Avenue, was called as a witness before Judge Henry Ellenbogen in criminal court.

" 'He read comic books and listened to gangster stories on the radio all the time he was home,' Mr. Manuel said simply, as he stood beside his son who towered above him."

Verification

To the Editor:

Mr. John H. Riordan has sent me a copy of the October JOURNAL, particularly referring to the article on the Public Defender system by Donald Freeman. I wish to congratulate Mr. Freeman on the article. I know that the statements set forth by him are correct, having been myself connected with this office for twenty-five years. For your information I am enclosing two copies of our last annual report. Please send ten copies of the October issue.

GERALD J. KENNY, Public Defender.

San Francisco, Calif.

School Lectures on Government and Law Enforcement Suggested

To the Editor:

Enclosed is my check for annual dues for 1948-49. As my previous correspondence would indicate, I am particularly interested in the improvement of our legal profession.

The part being taken by a few members of our profession in the unlawful and crime syndicated conditions in this state is a serious reflection upon our profession in addition to being detrimental to morals and the well being of our citizens generally. Active bar associations and individual members could eliminate many of the existing conditions to which I have referred. Some have already begun. Toward that end I specifically pledge my support to the American Judicature Society's activities.

The public is being deceived in some localities as to the powers, duties and responsibilities of our various public officials. Would it be possible to have lecture courses in our schools from the seventh grade level through college and law schools where such matters might be taught to improve the functioning of our governments and our law enforcement? Can we expect our citizens to abide by our basic and general rules and regulations when they have little or no knowledge of them?

J. MAX MITCHELL.

Benton, Illinois

A Two-Way Endorsement

To the Editor:

The JOURNAL seems to get better and better as time goes on. I have just been reading the October number, and I think it is remarkably stimulating. It is difficult to pick out the most interesting and constructive articles, but I am particularly pleased with two of them. The first is the editorial entitled "A Doubter Asks for Proof." The attitude of the JOURNAL in this respect seems to me entirely correct. I remember when I was Attorney-General that this particular problem was one to which I gave considerable attention. It was also included as a subject of discussion in the proceedings in the Attorney-General's Conference on Crime held December 10 to 13, 1934. Very likely you have available the proceedings of that conference, which were printed in book form and cover almost every conceivable aspect of the crime problem, including the one mentioned in the editorial.

The other article that drew my attention was the one dealing with the public defender system. I think this is a timely and useful article. I have long been an advocate of the public defender system as it applied not only to the various state courts but to the federal courts as well. I frequently made a recommendation to Congress on the subject. In my statement and recommendations to the Congress as Attorney-General on December 31, 1938, (which was only two days before I retired) I made what I hoped was quite a strong plea for the public defender system in the federal criminal courts. It is listed as Article IX in the statement and recommendations referred to.

HOMER CUMMINGS.

Washington, D. C.

[Extract from statement and recommendation:]

One of the many troublesome problems in connection with criminal prosecutions is to make certain that an indigent defendant is properly represented.

While it is the duty of members of the bar to undertake the defense of indigent prisoners, and it is a traditional practice for the courts to assign counsel to act in such cases without compensation, experience has shown that this procedure is unsatisfactory.

In recent years in a number of large counties and cities of the country, permanent officials have been provided to act as "public defenders." In at least one commonwealth this system has been adopted on a state-wide basis. Wherever it has been in operation it has proved successful both in preventing possible miscarriages of justice and in eliminating dilatory tactics and

technical obstructions on the part of defense attorneys.

It has been at times suggested that it is incongruous for the Government to employ one lawyer to prosecute and another to defend the same prisoner. This is a superficial point of view, for it overlooks the principle that the Government should be as anxious to shield the innocent as it is to punish the guilty. Moreover, many of those who in one breath oppose the creation of the office of public defender in the next breath approve the system in which lawyers are in fact assigned to defend indigent prisoners. As above stated, attorneys so assigned receive no compensation. It is not too much to say that, although many lawyers accept and undertake such tasks as a matter of professional duty, and perform them in a thorough and zealous manner, the system operates in a haphazard fashion and is far from successful. Moreover, it is questionable whether the burden is one that should be imposed on individual members of the bar.

I approve the principle of a public defender, and recommend its adoption for the federal judicial system.

The Literature of Judicial Administration

BOOKS

Protecting Our Children from Criminal Careers, by John R. Ellingston. New York: Prentice-Hall, 1948. Pp. x and 374. Cloth, $5.00.

Redirecting the Delinquent, edited by Marjorie Bell. 1947 Yearbook, National Probation and Parole Association, 1790 Broadway, New York 19, N. Y. Paper, 336 pages.

Two books of value to all interested in the administration of criminal justice, particularly with respect to young people. Mr. Ellingston, who is special adviser on criminal justice for youth to the American Law Institute, presents, against a background discussion of the nature of crime and general problems of juvenile delinquency, the model Youth Correction Authority act of the American Law Institute and a detailed analysis of its operation in California, where it was put into effect seven years ago, along with suggestions for a practical program of integrated and auxiliary services to all youth at the community level. Similar state-wide programs already have been adopted by Minnesota, Wisconsin and Massachusetts. Other states are or will be interested, and this book will be their text and reference book both in awakening the necessary public interest and in the mechanics of establishing these urgently-needed and epoch-making reforms in the administration of criminal justice and the conservation of human resources.

The N. P. P. A. *Yearbook* is a symposium of addresses and papers delivered at the Association's San Francisco conference and elsewhere, dealing with state administration, the adult offender, the radio and movies, police checks on delinquency, understanding the delinquent, the juvenile court, staff training, and the courts and the public. It also includes a digest of 1947 legislation and court decisions affecting juvenile courts, probation and parole.

The Federal Courts, edited by Brainerd Currie. Durham, N. C.: Duke University Law School, *Law and Contemporary Problems*, Vol. 13, No. 1, Winter, 1948. Paper, 242 pp., $1.00.

A symposium of eleven essays constituting, in the words of the editor, a re-examination of the federal judicial system as an institution and appraisal of its uses. Included are a historical review by John P. Frank, a most interesting survey of federal courts in foreign systems by Stefan A. Riesenfeld and John N. Hazard, and discussions of federal criminal jurisdiction by L. B. Schwartz, bankruptcy jurisdiction by William E. Mussman and Stefan A. Riesenfeld, jurisdiction of federal courts in labor disputes by Ray Forrester, federal courts and civil liberties by Osmond K. Fraenkel, the influence of federal procedural reform by Charles E. Clark, the law applied in the federal courts by Frank W. Snepp, the administration of the federal courts by Henry P. Chandler, federal judicial statistics by Will Shafroth, and federal jurisdiction and the revision of the judicial code by Herbert Wechsler.

ARTICLES

"The Apprehension of Criminals and the Publicity Problem," by Thomas E. H. Black.

Detroit Legal Record, August 5, 1948, p. 1.

"The Criminal Justice Bill 1947—A Cook's Tour," by N. R. Morris. Res Judicatae (Victoria, Australia), May, 1948, pp. 23-30.

"Report of Committee on Trend of Bar Admissions." The Bar Examiner, August, 1948, pp. 137-146.

"Preparation for Trial of a Lawsuit," by Ralph Oman. The Journal of the Bar Association of the State of Kansas, August, 1948, pp. 3-10.

"A Lay Committee Views the Courts," Report to Conference of Judges, 10th Judicial Circuit, Denver, July 22-24, 1948. The Journal of the Oklahoma Bar Association, August 28, 1948, pp. 1115-1120.

"Nation-wide Implications of Organized Crime," by Virgil W. Peterson. Criminal Justice, September, 1948, pp. 4-8.

"Full Rule-Making Power for the Superior Court," by Richard H. Phillips. Connecticut Bar Journal, September, 1948, pp. 198-202.

"Greater Uniformity in Procedure of County Courts," by Franklin D. Hepburn. The Detroit Lawyer, October, 1948, pp. 205-207.

"What About the Pennsylvania Plan," by Edward J. Fox, Jr. Pennsylvania Bar Association Quarterly, October, 1948, pp. 6-12.

"Philadelphia Adopts the Lawyer Reference Plan," by W. Clark Hanna. Pennsylvania Bar Association Quarterly, October, 1948, pp. 44-54.

"Uncle Sam Modernizes His Justice," by Frederic Sondern, Jr. The Reader's Digest, August, 1948; reprinted in Michigan State Bar Journal, October, 1948, pp. 21-23.

"Legally and Otherwise," by James B. Cooney. Chicago Bar Record, October, 1948, pp. 15-16, 18. (Mock trials by television.)

"Military Justice," by Frank H. Marks. Chicago Bar Record, October, 1948, pp. 23-26.

"Why You Can't Convict a Drunken Driver." Magazine Digest, March, 1948, pp. 51-55.

"Results of Poll of Lawyers at Duluth Convention." The Bench and Bar of Minnesota, August, 1948, pp. 5-7. (Public relations.)

"Amicus Curiae—Minister of Justice," by Edmund Ruffin Beckwith and Rudolf Sobernheim. Fordham Law Review, March, 1948, pp. 38-62.

"Treatment of Witnesses: Laymen's Suggestions for Better Handling," by Philip L. Graham. American Bar Association Journal, January, 1948, pp. 23-25.

"The New Rules of the Supreme Court on the Argument and Deciding of Appeals," by Arthur T. Vanderbilt. New Jersey Law Journal, March 18, 1948.

"Transcript of Pretrial Practice Exhibition Presented at Essex House, Newark, March 13th." New Jersey Law Journal, March 25, 1948.

"Probation: What It Can Do and What It Takes," by Henry P. Chandler. Federal Probation, March, 1948, pp. 11-16.

"The Judicial Office in the United States," by John J. Parker. New York University Law Quarterly Review, April, 1948, pp. 225-238.

"Measurement of Judicial Personnel," by Rodney L. Mott. New York University Law Quarterly Review, April, 1948, pp. 262-277.

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Proposed Plan for Organization of the Judiciary of Arkansas, 1946. Paperbound pamphlet, 50 pages. 15 cents each.

Pre-trial in the United States, by Harry D. Nims. Reprint from the Canadian Bar Review, August-September, 1947, 26 pages. Free postpaid.

Pre-Trial Procedure in the Wayne County Circuit Court, Detroit, Michigan, by Frank E. Cooper. Sixth Annual Report, Judicial Council of Michigan, May 1936. Pamphlet, free, postpaid.

Tentative Draft of an Act to Establish County Courts of Record to Supersede Justices of the Peace and Certain Other Inferior Courts, by Edson R. Sunderland. Sixteenth Annual Report, Judicial Council of Michigan, October, 1946. Pamphlet, free, postpaid.

Missouri Court Plan—A series of articles on how Missouri gets and keeps able judges, by Richard M. Morehead. Reprint from the Dallas Morning News, 1948, 16 pages. Free. Requests for more than one or two copies should go direct to the Dallas Morning News, Dallas, Texas.

The Juror's Creed, by David A. Simmons. Envelope-size reprint from JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, 32:4-5 (June, 1948). 50 cents per 100, plus postage.

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